IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

SANABEL EL-HAKEEM EL-ATTAR, PLAINTIFF,

VERSUS CIVIL ACTION NO. EC91-326-S-D

MISSISSIPPI STATE UNIVERSITY; DONALD ZACHARIAS, PRESIDENT; BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING; WILLIAM M. JONES, PRESIDENT; DR. CASS PENNINGTON; NAN MCGAHEY BAKER; FRANK O. CROSTHWAIT, JR.; BRYCE GRIFFIS; JOE A. HAYNES; WILL A. HICKMAN; J. MARLIN IVEY; JAMES W. LUVENE; DIANE MILLER; SIDNEY L. RUSHING; DIANE P. WALTON; BOARD MEMBERS; AND W. RAY CLEERE, COMMISSIONER; KIRK FORDICE, GOVERNOR OF THE STATE OF MISSISSIPPI, each individual in his official capacity, DEFENDANTS.

MEMORANDUM OPINION

This cause is before the court following two days of testimony, whereupon the court reserved issuing an opinion. During trial the parties stipulated that the defendants were being sued in their official capacities only.

Facts

The plaintiff is a naturalized citizen of the United States, but was born in Egypt. Her native language is Arabic and she speaks English as a second language. In 1973, she received a Masters of Arts (M.A.) degree in Sociology and Demography from the University of Georgia. She received a Masters of Business Administration (M.B.A.) and a Masters of Science in Business Administration (M.S.B.A.) in Information Systems from Mississippi State University.

In 1985, the plaintiff applied for admission into the Doctoral of Business Administration (D.B.A.) program at MSU, but was denied. Only the minutes of the December 12, 1985, Graduate Policies Committee Meeting survive of the plaintiff's earliest application. The minutes read:

> The committee voted not to admit Sanabel E-Attar to the doctoral program based upon her present qualifications. The student will be offered the option to retake the GMAT. If the acceptable score can be achieved, the Committee will reconsider her application for the DBA program at a later date.

Between 1985 and 1991, the plaintiff took the GMAT exam and applied for admission to the DBA program. She did not achieve a score over 500 until 1992. She was never accepted into the DBA program.

The plaintiff alleges that she has been denied admission because her Graduate Management Admission Test (GMAT) score had failed to reach the graduate program's minimum score of 500. She maintains that the GMAT was used by MSU as the go/no go factor for her admission, and since women and persons of foreign origin consistently score lower than other individuals, then use of a minimum GMAT score as a determinative factor inflicts a discriminatory disparate impact.

The Bulletin of the Mississippi State University graduate school sets forth the standards for the doctoral program. An applicant must score a 550 on the GMAT (in 1986 it was 500) and a cumulative quality point average (QPA) of 2.75 out of 4.0; plus a minimum QPA of 3.25 on all prior graduate work in business; no more than 20 percent of which can be below a "B". The Bulletin

specified that: "Consideration will be given to an applicant who is deficient in not more than one of the specifications cited above." The defendants argue that the plaintiff never scored higher than 490 on the GMAT, and did not have a QPA appreciably higher or outstanding recommendations to counter her GMAT deficiency. Dr. Rodney A. Pearson, Associate professor of management information systems and director of the plaintiff's master's thesis, did not recommend the plaintiff for admission into the D.B.A. program. He stated during trial that: "I did not believe the depth of her knowledge was sufficient for her to teach in this field." The defendants assert that the individuals admitted into the DBA program who failed to score 500 or better on the GMAT had QPAs markedly better than the requirements which balanced the applicants overall qualifications. The defendants propose that this shows that they did not use the GMAT as the determinative factor, and additionally, that it is evidence of a nondiscriminatory reason for accepting the applicants of non-foreign origin who, like the plaintiff, failed to score 500 on the GMAT.

Even though the plaintiff was never accepted into the DBA program, she was allowed to continue taking courses after she had completed her M.S.B.A. She has taken over 76 hours in graduate classes towards her D.B.A. degree. The plaintiff has served as a graduate assistant in the Business School and taught several undergraduate classes. The plaintiff contents that she has completed all requirements for a D.B.A. program, except for the

comprehensive exams and her dissertation. Several of the defendants' witnesses who were professors testified that since they expected higher quality from D.B.A. candidates and assigned them a greater quantity of work, the extra course work the plaintiff has taken has no application towards her D.B.A. degree.

Discussion

"In the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7, Congress abrogated the States Eleventh Amendment immunity under Title IX [and] Title VI...." Franklin v. Gwinnett County Pub. Sch., 117 L.Ed.2d 208, 221 (1992). During the trial, before the plaintiff had rested, she stipulated that her suit was only against the defendants in their official capacity and that her Title VI claim was strictly based on national origin. The court assumes that her Title IX claim remains.

A. National Origin Discrimination

Title VI, 42 U.S.C. § 2000d, provides:

> No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance.

A Title VI action can now be maintained as either a disparate treatment case, where proof of discriminatory motive is critical, or as a disparate impact case, involving practices that are facially neutral, but which result in adverse treatment of different groups. While title VI itself, like the Fourteenth

Amendment, bars only intentional discrimination, the regulations promulgated pursuant to Title VI make it unlawful to effect disparate impact on groups protected by the statute, even if those actions are not intentionally discriminatory. See Guardians Asso. v. Civil Service Com., 463 U.S. 582, 584 n.2 (1983); Alexander v. Choate, 469 U.S. 287, 292-94 (1985); Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1406 (11th Cir 1993). Proof of discriminatory intent is not necessary in a disparate impact case. The Supreme Court also has held that proof of discriminatory intent is not required in a Title VI action for equitable relief. See Castaneda v. Pickard, 781 F.2d 456, 465 n. 11 (5th Cir. 1986).

The United States Department of Education has promulgated regulations pursuant to Title VI that prohibit recipients of its funds from taking certain actions which have a disparate impact on groups protected by the statute. The regulations state in its pertinent part:

> A recipient ... may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the **effect** of subjecting individuals to discrimination because of their race, color, or national origin, or have the **effect** of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

34 C.F.R. § 101.3(b)(2) (emphasis added). Most Title VI disparate impact cases in the educational context have involved challenges to the classification of students by ability through the use of standardized test and other methods. See Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403 (11th Cir. 1985)

(challenge to use of achievement grouping in Georgia public schools); Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984) (challenge to use of certain IQ tests to assign children to classes for educable mentally retarded); cf. Sharif v. New York State Educ. Dep't, 709 F.Supp. 345 (S.D.N.Y. 1989) (Title IX disparate impact challenge to use of Scholastic Aptitude Test to allocate state merit scholarships; court borrows Title VI disparate impact standards).

> To establish liability under the Title VI regulations disparate impact scheme, a plaintiff must first demonstrate by a preponderance of the evidence that a facially neutral practice has a disproportionate adverse effect on a group protected by Title VI. [T]he defendant then must prove that there exists a substantial legitimate justification for the challenged practice in order to avoid liability. [T]he plaintiff will still prevail if able to show that there exists a comparably effective alternative practice which would result in less disproportionality, or that defendant's proffered justification is pretext for discrimination.

Elston v. Talladega County Bd. of Educ., 997 F.2d at 1407. The plaintiff must show that "a facially neutral ... practice has the result of producing a significantly adverse impact...." Page v. U.S. Industries, Inc., 726 F.2d 1038, 1045 (5th Cir.1984). Then the defendant must show that the challenged course of action is demonstrably necessary to meeting an educational goal. See Georgia State Conference, 775 F.2d at 1418.

The plaintiff alleges that the GMAT is used as the determinative factor for admission to the DBA program. This is not the conclusion the court has reached. The bulletin that articulates the guidelines for application to the DBA program

states that an applicant should have a minimum 500 score, but that consideration is given to applicants who have deficiencies which are minimized by other performance factors. Repeated testimony by professors in the program showed that factors other than the GMAT score were considered. The court is most struck by the poor recommendation the plaintiff received from her master thesis advisor, Dr. Rodney A. Pearson. Finally, the court notes that some applicants who had been accepted into the DBA program had scored below 500 on the GMAT. This indicates that the GMAT was not the determinative factor.

The plaintiff has submitted as evidence of the disparate effect of the use of the GMAT as an admission criteria, an incomplete list of vital information about applicants and admitted students. The plaintiff compiled no final statistical analysis of the raw data, nor did she provide any expert assistance as to how to derive hard numbers from the list. The court reluctantly admitted the lists under the understanding that, being a nonjury trial, the court would give the evidence appropriate weight after conclusion of all of the evidence. It seems the plaintiff is seeking the court to take judicial notice that use of the GMAT has a disparate impact upon females and persons of foreign origin. The court can not categorically do so. Although the manufacturers of the GMAT warn of using it as the sole criteria for determining admission and of its propensity for returning lower scores to females and persons of foreign national origin, this does not sway

the court to find disparate impact in this particular circumstance, especially, in light of the overwhelming evidence that the GMAT was not the determinative factor for admission, and the questionable qualification of the plaintiff. The court concludes that there is no proof that the defendants used a score of 500 on the GMAT as the determinative factor for admission, nor is there any credible evidence of disparate impact in the implementation of the admission procedure.

B. Sex Discrimination

Title XI, 20 U.S.C. § 1681(a), provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal Financial assistance....

The Fifth Circuit Court of Appeals held in Chance v. Rice University, 984 F.2d 151, 153 (5th Cir. 1993), that Title IX required a showing of intentional discrimination. The plaintiff has presented no proof of intent, but has argued pursuant to the regulations drafted under Title IX that use of the GMAT effects a disparate impact upon females. In Guardians Asso. v. Civil Serv. Com., a bare majority of the United States Supreme Court held the regulations of Title VI to validly provided for a disparate impact standard. The Department of Education's regulations implementing Title IX are crafted after Title VI regulations and prohibit some facially neutral policies. See Cannon V. University of Chicago, 441 U.S. 677 (1979) (Title IX patterned after Title VI). The

regulations provide that:

> A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

34 C.F.R. § 106.21(b)(2). The court holds that a cause of action can be maintained pursuant to these regulations without proof of discriminatory intent. See Sharif, 709 F.Supp. at 361.

Although the court has concluded that the GMAT has not been used by the defendants as the determinative factor for admission into the DBA program, the court is concerned that the language of the regulation bars any use of a test which has a disparate impact. In Sharif, the plaintiffs' challenged the use of the Scholastic Aptitude Test (SAT) as the basis for awarding New York State merit scholarships by way of a preliminary injunction. The plaintiffs presented persuasive statistical evidence and credible expert testimony to prove that using only the SAT had a disparate impact on females. The Sharif court concluded that since the SAT was used as the sole basis for awarding the scholarships, and since the SAT was convincingly shown to have a disparate impact on females, then the plaintiff would likely succeed on the merits. This court sees not reason to depart from this deductive conclusion. Again, the overwhelming proof indicated that the defendants did not use the GMAT as the sole criteria for admission. The plaintiff has not presented the court with persuasive statistical data, nor any

credible expert testimony. Finally, the court is suspicious of the plaintiff's qualification to be admitted to the DBA program.

The court concludes that the defendants' use of the GMAT as a factor for admission has a legitimate educational justification. The court will not interfer with the defendant's admission procedure, barring some evidence of disparate intent or impact.

> Judicial evaluation of academic decisions requires deference and they are overturned only if they are "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."

Williams v. Texas Tech Univ. Health Sciences Ctr., 6 F.3d 290, 294 (5th Cir. 1993) (quoting Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 225 (1985)). "A state university has a significant interest in having reasonable discretion to administer its educational programs." Williams, 6 F.3d at 293. Finally, the court will note that although the plaintiff has taken sufficient credit hours to have completed her class work for a doctorate degree, she did not take the courses as a DBA student. The testimony and common sense establish that there is a difference in the treatment of students taking a class for credit towards a masters degree and those taking the same course for a doctorate degree.

Accordingly, IT IS THE OPINION of the court:

That the plaintiff has failed to establish that the defendant have violated the regulations drafted under Title VI and Title IX. The court finds for the defendants. The plaintiff's complaint is

dismissed with prejudice.

SO ORDERED, this the _____ day of September, 1994.

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CHIEF JUDGE